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QUESTION PRESENTED

Whether Oregon's system of judicial review of facts found by juries violates procedural due process.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

A. Introduction

According to Honda, it is the victim of a "freakish" Oregon procedural system, one that provides "no check on juries" and gives them "unreviewable authority" over damages verdicts. Brief of Petitioners ("Pet. Br.") at 11. In Honda's view, Oregon law left it helpless against a jury that was "bedazzled" by its wealth, "bias[ed]" against its Japanese ownership, and inadequately instructed by the trial judge. *Id.* at 25, 26, 32. This story has no basis in fact.

Honda has not accurately described the full extent of judicial oversight of compensatory and punitive damage awards in Oregon. In addition to providing comprehensive pre-verdict protections, Oregon law does *not* deny judicial review of the size of damages verdicts. Indeed, such review was available to Honda and was afforded in this very case. In the end, Honda can support only the limited point that Oregon courts will not inquire into whether a damages award is "'excessive or in any other respect opposed to the weight of the evidence.'" Pet. Br. 3 (quoting *Van Lom v. Schneiderman*, 210 P.2d 461, 465 (Or. 1949)). That is, the "excessiveness" review so highly lauded by Honda is merely a species of weight-of-the-evidence review.

But there can be no constitutional right to such a particular form of review. The question before this Court is ultimately whether a punitive damage award violates the Due Process Clause merely because a judge, based on his or her personal view of the weight of the evidence, would conclude that the award is "excessive," even though there is judicial review to ensure that the award: (1) was imposed by a jury whose discretion was narrowly confined by a plethora of procedural safeguards; (2) satisfied federal substantive due process; (3) was imposed in a fair proceeding free of any kind of legal error; (4) was not the product of passion or prejudice; and (5) was supported by substantial evidence. The answer is self-evident.

B. Procedural History of this Case

Honda's failure to address the available procedural protections in Oregon law is quite surprising in light of the fact that Honda enjoyed many of them in the courts below, and those that it did not

invoke were nonetheless available to it. Honda was willing to accept the benefits of Oregon procedure until this Court's decision in *Pacific Mutual Life Ins. Co.v. Haslip*, 499 U.S. 1 (1991); after that decision was announced — when this case was on appeal — Honda apparently recognized the strategic value of caricaturing the Oregon system as one that denies judicial review of punitive damages awards altogether. But the procedural history of this case belies Honda's current claims.

1. The Parties' Claims and the Jury's Verdict

In 1985, while respondent Karl Oberg was driving one of Honda's three-wheel all-terrain vehicles ("ATVs") up a steep hill, the 325-pound vehicle suddenly flipped over backwards on him. It crushed many of the bones in his face and skull, causing serious permanent injuries. Oberg filed suit, alleging among other things that the vehicle had flipped due to its inherently dangerous design, that Honda was aware of the dangers, and that Honda nevertheless had promoted the vehicle as safe and failed to warn consumers of the grave dangers posed by ordinary operation of the vehicles.

A notice of proposed rulemaking by the Consumer Product Safety Commission cited the "performance characteristics" of ATVs like Honda's as a "significant factor" in a staggering record of injuries: more than 68,000 accidents requiring emergency room visits in 1984 alone, and at least 161 deaths in the three years prior to Oberg's 1985 accident. Pet. App. 67a-68a. The CPSC viewed "the ever widening knowledge of fatal incidents," and the many severe injuries, as "alarming and ominous," and as constituting perhaps "one of the most significant and explosively growing product hazards ever considered by this agency." Pet. App. 65a. The evidence indicated that Honda had marketed in excess of a million ATVs over more than a decade despite actual knowledge of such risks and that Honda had deliberately refused to make scientific tests of safety, to make needed safety improvements of known design flaws, to warn of these dangers, or to recall vehicles that were deceptively unstable and therefore inherently dangerous. *See* note 29, *infra*.

Honda's defense at trial was that its ATVs were reasonably safe for their intended purpose and that the accident was all Oberg's fault. Although Honda acknowledged that it had promoted the ATV

model that Oberg was driving as the "King of the Hill," Honda attacked Oberg as reckless for accepting the opportunity to ride the new model up a short, steep hill. Tr. 3:52. In Honda's view, its vehicles were perfectly safe and it was the riders of the vehicles who were at fault for the tens of thousands of injuries occurring each year. *See, e.g.*, Tr. 3:72-78; Tr. 18:1866-1947; Tr. 25:2864-81. Thus, Honda argued that this case simply involved "a rider who misjudged the technique and misjudged his own ability" to ride up the hill. Tr. 3:91.

Oberg was required by Oregon rules to specify in his complaint the maximum amount of punitive damages he would seek at trial. ORCP 18B. Before and during trial,[1] Honda repeatedly moved to dismiss Oberg's punitive damages claim — arguing, for example, that the evidence did not support any punitive damages at all — but it elected not to include an argument in the alternative that the evidence did not support an award of $5 million. In arguments to the jury Honda pursued a strategy of focusing solely on liability and declining to suggest a dollar figure for punitive damages counter to Oberg's request for a $5 million award.[2] Oberg was not allowed

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[1] Honda moved pre-trial to dismiss Oberg's claim for punitive damages. Motion of April 4, 1989. At the end of plaintiff's evidence and again at the close of all evidence, Honda reasserted its objections to the punitive damages claim. The trial court ruled: "I will deny that motion on [the constitutional] ground, and also on the lack of evidence ground." Tr. 23:2728.

[2] Contrary to the suggestion that Oberg made a naked appeal to Honda's wealth in arguing the proper amount of punitive damages, *see* Pet. Br. at 4, 24-25, Oberg's argument was narrowly focused on the amount that would be necessary to deter a corporation of Honda's size from similar actions endangering the public in the future. Argument centered on the "need to make an example" of the wrongdoer, and the fact that "there are no criminal remedies that apply in a case like this," because "[y]ou can't put a corporation in jail," which is "really why we have punitive damages." Tr. 24:2836-37. Honda was described as "stubborn and inert" in failing to remedy the dangers it knew it was imposing on the public, and the jury was told: "Clearly someone needs to get their attention. History and common sense teach us that corporations respond to money. . . . Getting Honda's attention is a large part of what you're here for." Tr. 24:2838. It was in this reasoned, restrained context that Oberg noted that Honda's stipulated net worth was $4.9 billion, and suggested that 1/10th of 1 percent of that sum was necessary to "[g]et[] Honda's attention." *Id.*

Notably, Honda *never objected* to this line of argument and, in fact, attempted to rebut Oberg's argument on its own terms. *E.g.*, Tr. 25:2875

to introduce evidence regarding Honda's financial condition until he "presented evidence sufficient to justify . . . a prima facie claim of punitive damages." ORS 41.315(2). After this had been done, Honda stipulated that the jury should be told that, in setting punitive damages, it must take into account Honda's net worth of $4.9 billion.[3]

The trial judge gave the jury the extensive instructions that are required by Oregon law in product liability actions. *See* Pet. App. 23a n.11.[4] The jury was told that punitive damages could be

("[D]o you have Honda's attention? Yes, you do. Do you need to send a message to Japan? You have the inventor who came in and addressed you, to give his side and to explain it.").

[3] At trial, Honda waived the argument it now attempts to raise that "a *corporate* defendant's wealth has no rational connection to the setting of an appropriate penalty." Pet. Br. at 25 n.17 (emphasis in original). In fact, Honda explicitly approved a stipulation concerning the total wealth represented by all of Honda's lines of business, prepared by Oberg, which Honda said was "acceptable as is," and which informed the jury: "If witnesses were called, the evidence would establish that the net worth of the defendant Honda companies is $4.9 billion." Tr. 23:2703. This was duly read to the jury. *Id.* Later, Honda chose not to object to the jury charge instructing the jury to take into account this stipulated wealth figure in setting punitive damages. Tr. 25:2959-60.

[4] ORS 30.925 provides:

(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.

(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

awarded only if Oberg made out his claim by "clear and convincing evidence." *Id.* Despite its current view that "the instructions actually given in this case did not serve as a meaningful and effective constraint on the jury's discretion," Pet. Br. at 32, at trial Honda made *no constitutional objection of any kind* to *any* of the instructions governing the jury's determination of punitive damages; rather, it simply reiterated its "blame the rider" position that it had done nothing wrong and that the jury should not be allowed even to consider the issue of punitive damages.[5]

Honda acquiesced in the jury charge stating that "the amount of general damages may not exceed the sum of $900,000" and that "the amount of punitive damages may not exceed the sum of $5 million." Tr. 25:2942, 2944. Honda did not ask the judge to put smaller caps on the amounts the jury could award. Nor did Honda seek a special verdict form that would have required the jury to specify its findings with respect to the relevant statutory criteria on

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

[5] Honda excepted to the jury instructions at trial as follows:

> With the exception, or aside from, or I should say in addition to the statutory to the written instructions, *to be consistent with our position on punitives, I want to except to the court's giving any instruction on that* . . . .

Tr. 25:2959 (emphasis added). Further, Honda expressly waived the right it enjoyed under Oregon law to an instruction referring to "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the plaintiff's." ORS 30.925(3)(g). The case at bar was the first time in which punitive damages were imposed on Honda for the misconduct in question, and Honda argued to the trial court that such an instruction "is, under the current state of the evidence, not applicable." Appendix A to Oberg Ore. Sup. Ct. Br., filed Dec. 31, 1991, at App-2. That statement disposes of Honda's current complaint that the jury "was not instructed whether it could take into account, for example, the possibility that Honda would be held liable for the same conduct in other cases." Pet. Br. 32.

damages embodied in the jury instructions.

Although the twelve-person jury did not accept Honda's sweeping "blame the rider" defense completely, it did find some fault on both sides; it found Oberg 20 percent at fault for the accident and Honda 80 percent at fault. As compensation for Oberg's medical expenses, lost earnings and pain and suffering, the jury awarded $919,390.39, reduced to $735,512.31 in light of Oberg's partial fault.[6] The jury also found that Honda was guilty of wanton misconduct and that a punitive damages award of $5 million was necessary to deter similar misconduct by Honda and others in the future.

2. The Trial Court's Rulings on Honda's Post-Verdict Attacks on the Size of the Damages Awards

In its post-trial motions, Honda invoked three different standards under Oregon law for reviewing the size of damages verdicts: (a) a passion-or-prejudice test, (b) a "substantial evidence" test, and (c) a weight-of-the-evidence standard.

(a) Passion-or-Prejudice Review

Honda argued for a new trial on the ground that:

> The jury's verdict is clearly the product of passion and prejudice. The damages awarded bear no relationship to plaintiff's actual damages or defendants' conduct. Rather, defendants believe that the jury's awards simply reflect unfair prejudices inflamed by improper testimony such as references to dissimilar accidents, to alleged age discrimination, and to the cessation of sales of three-wheel ATVs.

Honda New Trial Mot., filed May 25, 1989, at 54-55. Honda contended that such judicial review of the level of "damages awarded" was "wholly consistent with the spirit of the 'no evidence' clause of the Oregon Constitution." *Id.* at 54. Honda emphasized to the trial court that Oberg did "not dispute that *this Court possesses the power to order a new trial for excessive damages* appearing to have been given under the influence of passion or prejudice." Honda New Trial Reply, filed June 22, 1989, at 24-25 (emphasis added).

In its passion-or-prejudice argument, Honda did not claim that the jury was motivated by xenophobia, or by a bias against Honda's wealth.[7] Rather, Honda relied entirely upon the evidentiary

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[6] Of the $919,390.39 in compensatory damages, the jury awarded $900,000 in general damages, the maximum allowed under the jury instructions, and $19,390.39, the stipulated medical expenses. In its award of general damages, the jury rejected the figures suggested by both Oberg and Honda. Oberg suggested that the jury should award $50 per day for Oberg's life expectancy of 49 years, or $882,000. Tr. 24:2835-36. Honda's counsel confided that "I'm not always good at picking a reasonable number," but suggested that "more than $50,000 in damages to Mr. Oberg would be enrichment and not compensation." Tr. 25:2890. At no time did Honda make an argument to the jury, or introduce evidence to support its present suggestion that the award should not have exceeded approximately $300,000, because this sum could have generated $50 per day in interest, the amount mentioned by Oberg's counsel, if invested in 30-year treasury bonds (ignoring, of course, the problem of inflation during the next 30 years). Pet. Br. at 6 n.3.

[7] Any post-trial complaint about the jury's consideration of Honda's wealth would have been frivolous: Honda failed to object to the relevant instruction, stipulated to the jury's being told of its net worth, and failed to object to Oberg's closing argument suggesting that the jury award 1/10th of 1 percent of Honda's net worth as punitive damages. See notes 2, 3 & 5, *supra*.

Any claim of xenophobia likewise would have been insupportable. Honda now complains that the jury "was not told to *disregard* Honda's status as a foreign-owned company." Pet. Br. at 32. But Honda never asked for such an instruction. See note 5, *supra*. The protections on this score that it *did* ask for were granted: at the voir dire stage, a 14-page Jury Questionnaire drafted largely by Honda inquired into prospective jurors' attitudes toward Honda products (Question 33), into ownership of Japanese automobiles (Question 35), into whether the jurors had visited Japan (Question 36) and into the jurors' "opinions, one way or the other, as to whether Japanese-manufactured products should be sold in American markets." One *amicus* brief filed in support of Honda asserts that in this case "the jury was reminded that the manufacturer was a Japanese corporation," Br. of Product Liability Advisory Council, *et al.*, at 14, but no citation to any argument by *Oberg's counsel* is provided (it was Honda's counsel who injected the issue into his closing argument, saying that there was no "need to send a message to Japan" because the ATV's inventor had travelled from Japan to testify, *see* Tr. 25:2875).

The same *amicus* brief argues that plaintiff's counsel described Oberg as "'a red-blooded 20 year old American boy,'" and asserts that "[t]here can be little doubt as to the intended insinuation." *Id.* at 14 (quoting Tr. 24:2807). But as lines 6 to 24 of the quoted page make abundantly clear, there was no attempt to contrast the plaintiff's nationality with Honda's foreign ownership.

admission of supposedly "improper testimony," *id.* at 54: (1) evidence that was upheld by the Oregon Supreme Court as properly admitted, which Honda does not here challenge;[8] (2) evidence produced by Honda itself on its cross-examination of one of its former employees;[9] and (3) evidence produced by Oberg without

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Rather, Oberg's counsel was arguing that Honda had marketed an inherently dangerous product that was "seductive" to the target consumer group: "It makes you want to get on it. A red-blooded 20-year old American boy can't resist it, especially if he's a motorcycle nut." Tr. 24:2807.

Beyond the lack of support for Honda's complaints on this record, Oregon law in general provides thorough jury selection procedures to screen out any elements of prejudice or bias among potential jurors. At voir dire, each party is permitted to question prospective jurors extensively. ORCP 57C. Biased jurors may be excused for cause. ORCP 57D(1); *State v. Montez*, 789 P.2d 1352, 1360-72 (Or. 1990). Each party also has three peremptory challenges to remove jurors whom it feels could not fairly judge the case. ORCP 57D(2). Oregon law requires new trials if there is evidence of jury misconduct or irregularity. ORCP 64B(1), (2). Moreover, Oregon law prohibits arguments by counsel having "a tendency to incite the hostility of the jury against an opposing party." *Devine v. Southern Pacific Co.*, 295 P.2d 201, 208 (Or. 1956). Oregon courts have made clear that, given timely objection, they will take appropriate steps to cure appeals to jury bias, including issuing curative instructions, declaring mistrials, or granting new trials. *Oregon v. Montgomery Ward Development Corp.*, 719 P.2d 507, 515-16 (Or. App. 1986).

[8] Honda claimed that there were improper "references to dissimilar accidents," Honda New Trial Mot. at 54-55 — namely, the extensive documentary proof that Honda was on notice from the Consumer Product Safety Commission that ATVs were causing scores of deaths and thousands of grave injuries. The Oregon intermediate appellate court rejected this argument (Pet. App. at 75a-78a) as did the Oregon Supreme Court (Pet. App. at 3a-8a), and Honda does not press the matter in this Court.

[9] Honda claimed that it was prejudiced by improper references to "alleged age discrimination." Honda New Trial Mot. at 55. In fact, the problem was one of Honda's own creation. On cross-examination of one of its former employees, called by Oberg to testify about safety problems in Honda's ATVs, Honda sought to elicit information about how the witness's employment had terminated, hoping to discredit the witness by showing that he had been fired for poor performance. The witness disagreed, stating: "I was fired because of my age." Tr. at 5:485. He further stated that he filed suit and that "Honda admitted they were wrong and settled with me." Tr. 5:488. Honda never introduced evidence to contradict these statements. In its new trial motion Honda raised this incident as legal error requiring a new trial independent of the amount of damages. *See* Honda New Trial Mot. at 36-37. The argument was rejected, and Honda did not raise the point on appeal.

objection after Honda's cross-examination opened the door and created the need for a response.[10]

Oberg argued in reply that neither the compensatory award nor the punitive damages award was the product of passion or prejudice: (a) Regarding the compensatory award, Oberg maintained that the "medical evidence clearly established that [he] suffers from permanent life-altering inner-ear damage, facial damage, and cognitive damage." Oberg New Trial Response, filed June 12, 1989, at 45. He pointed out that Honda had introduced no evidence at all to rebut this showing of severe permanent harm. *Id.*

(b) On the punitive award, Oberg argued that overwhelming evidence in the record demonstrated that Honda had "acted wantonly and recklessly in its course of conduct of testing, designing and marketing unreasonably unsafe products." *Id.* at 45-46. Significantly, Oberg also pointed out that Honda had failed to offer any quantitative alternative to his suggestion that a punitive damages award equivalent to 1/10th of 1 percent of Honda's net worth — that is, an award of $5 million — would be needed to deter Honda and other companies from similar wrongdoing in the future. *Id.*

Moreover, the theory that the jury was swept away by prejudice against Honda flies in the face of the jury's verdict *against* Oberg, finding him partially negligent and requiring that his recoverable compensatory damages be reduced by 20 percent.

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[10] Honda claimed that it was prejudiced by improper references "to the cessation of sales of three-wheel ATVs" after Oberg's accident, Honda New Trial Mot. at 55, something that Honda had worked throughout the trial to prevent the jury from learning. Honda tripped itself up by seeking to discredit one of Oberg's experts on vehicle safety, who stated that the vehicle that had injured Oberg was defective because its design did not utilize a "rollover system" to protect the driver's head from being crushed by the vehicle. Honda sought to discredit the expert by pointing out that he had never designed a rollover system for a three-wheel ATV. Tr. at 23:2588. To rebut the suggested inference that the expert was inexperienced in the field, Oberg properly elicited on cross-examination the reason the expert had never done the design: the "[v]ehicles are no longer manufactured, and I haven't been asked to." Tr. at 23:2595. In its new trial motion Honda raised this incident as legal error requiring a new trial independent of the amount of damages. *See* New Trial Mot. at 16-18. The argument was rejected, and Honda dropped the point on appeal.

(b) Sufficiency-of-the-Evidence Review for "Substantial Evidence"

In its motion for judgment n.o.v., Honda contended that "a judgment for defendants notwithstanding the verdict should now be entered on the grounds that there was no substantial evidence to support the jury's findings of either liability or damages. Plaintiff's evidence was insufficient . . . to prove that plaintiff was injured in the sum of $919,390.30 or to prove punitive damages in the sum of $5,000,000." Honda JNOV Mot., filed May 25, 1989, at 3. Honda also sought a new trial on the ground that "[t]he jury's damages award is excessive in amount and mandates a new trial as . . . the jury's verdict is not supported by the evidence." Honda New Trial Mot. at 3.[11] Honda cited the Oregon Supreme Court's decision in *Van Lom v. Schneiderman*, 210 P.2d 461 (1949), but noted that *Van Lom* "divested both Oregon trial courts and its appellate courts of their common law power to set aside excessive jury verdicts, *except in cases where there exists no evidence supporting the verdict*." Honda New Trial Mot. at 48 (emphasis added). Honda argued that a new trial would be available under Oregon law, "[w]hatever [legal] standard is applied." *Id.* at 53.

(c) Weight-of-the-Evidence Review

Finally, in its new trial motion Honda urged the trial court to adopt a more "equitable" interpretation of *Van Lom*, which Honda said prevented Oregon courts from granting new trials where "the jury's verdict is excessive and against the clear weight of the evidence." Honda New Trial Mot. at 49, 50. Honda thus recognized that *Van Lom* relates specifically and exclusively to weight-of-the-evidence review.

This argument, along with Honda's sufficiency-of-the-evidence and passion-or-prejudice contentions, was denied by the trial court in a written order, with no indication that it believed that sufficiency

[11] Honda contended, for example, that "neither the jury's compensatory damage award nor its punitive damage award has any reasonable relationship to plaintiff's actual damages," *i.e.*, Oberg's $19,390.39 in medical expenses. Honda New Trial Mot. at 50-51. In support of this claim, Honda made detailed factual arguments concerning the nature of Oberg's medical care, injuries, employment history and pain and suffering. *Id.* at 51-52.

or passion-or-prejudice review were unavailable under Oregon law — or that Honda had misread *Van Lom*. The court did not elaborate its reasons for decision, perhaps because Honda did not ask it to do so.

3. The Appellate Opinions Rejecting Honda's Request for Weight-of-the-Evidence Review of "Excessiveness"

On appeal, Honda urged the Oregon Court of Appeals to reverse the trial court's judgment and remand for a new trial. Honda maintained that *Van Lom* did not preclude either passion-or-prejudice or sufficiency-of-the-evidence challenges to the size of the damages award. Honda argued that "*Van Lom* left open the question of whether Article VII, § 3, affected the trial court's power to grant a new trial for excessive damages appearing to have been given under the influence of passion and prejudice." Honda Ct. App. Br., filed Aug. 1, 1990, at 41. Indeed, Honda contended that "*Van Lom* suggested that the size of the verdict alone might be sufficient" to indicate passion and prejudice. *Id.* at 41 n.29. In addition, Honda reprised its "substantial evidence" argument.[12]

The court of appeals did not hold that either passion-and-prejudice or sufficiency review is unavailable under Oregon law. In fact, the court explained that, although Article VII, § 3 "prohibits trial and appellate courts from setting aside a verdict on the ground that it is excessive," that constitutional provision "does allow appellate review of a punitive damages award to determine whether there is any evidence to support the verdict." Pet. App. 86a-87a. "The combined effect of the restrictions on jury discretion mandated by ORS 30.925 *and appellate review* ensures that the fact finder be guided by more than a defendant's financial condition and that there be a rational relationship between the *amount of the award* and what is necessary for deterrence." *Id.* at 87a (emphasis added).

[12] Honda contended that "*Van Lom* held that Article VII, § 3 prevented Oregon's courts from setting aside excessive jury verdicts, except where no evidence exists to support the verdict," Honda Ct. App. Br. at 40, and Honda maintained that, "[w]hatever standard is applied, both the compensatory and punitive awards [here] are excessive and unsupported by evidence." *Id.* at 43. For example, Honda argued that Oberg "offered no significant evidence that he would require future medical care"; that he "also failed to prove that he will lose any wages as a result of the accident"; and that he "presented no evidence to support an award of $900,000.00 for future non-economic loss." *Id.* at 42.

Nor did the Oregon Supreme Court hold that either passion-or-prejudice or sufficiency review is unavailable under Oregon law. Instead, the state supreme court explained that "a fact decided by a jury may be re-examined when a reviewing court can say affirmatively that there is no evidence to support the jury's decision." Pet. App. 27a. In this case, the court found that "there was evidence to support [the jury's] determination." *Id.* at 33a. The court observed that "[d]efendants do not claim that the trial court failed to instruct the jury concerning the statutory criteria or that the jury did not properly apply those criteria." *Id.* at 22a n.11. Accordingly, the Oregon Supreme Court affirmed the judgment.

SUMMARY OF ARGUMENT

The compensatory damage award must be affirmed because Honda waived any challenge to it below.[13]

[13] As Oberg explained in his Opposition to *Certiorari* at 2, 10, Honda did not assert that the compensatory award violated due process until it sought discretionary review in the Supreme Court of Oregon. As Honda admits, that court did not pass on the tardy challenge. Pet. Br. at 8. *See Waller v. Rocky Mountain Fire & Cas. Co.*, 535 P.2d 530, 536 (Or. 1975); *State v. Hickmann*, 540 P.2d 1406, 1407 (Or. 1975); *Smith Kline & French Labs. v. State Tax Comm'n*, 403 P.2d 375, 378 n.1 (Or. 1965). It is well settled that "it will be presumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Honda has made no attempt to make this showing, or to comply with Supreme Court Rule 14(h). There is obviously nothing to Honda's excuse that it "could not present [the procedural due process] claim [as to compensatory damages] until after . . . the trial court declined to review the compensatory award." Honda Reply Br. in Support of *Cert.* at 7. That does not remotely explain Honda's failure to present this claim to the intermediate appellate court.

Honda suggests that, rather than concluding "that the Oregon Supreme Court's failure to expressly address the compensatory award constitutes an implicit holding of waiver," it would be "far more sensible to understand the Oregon Supreme Court's silence as constituting a recognition that separate discussion of compensatory damages was unnecessary: if punitive awards are unreviewable, *a fortiori* so are compensatory awards." *Id.* at 8 n.9. This speculative assertion falls far short of the requisite affirmative showing. Even if compensatory damages might logically be swept within the ambit of Honda's legal principle, that would not excuse the need for a specific challenge to the compensatory award.

The punitive damage award should also be affirmed.

I. The proceedings in this case clearly complied with this Court's decisions in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993).

A. As a totality, the Oregon punitive damages system plainly comports with due process. Oregon law provides extensive pre-verdict constraints on jury discretion: a requirement that plaintiffs plead a specific amount of punitive damages in their complaint, which becomes a ceiling that the jury cannot exceed; a standard of clear-and-convincing evidence for the imposition of punitive damages; extensive statutory criteria that give the jury detailed guidance as to the factors it is to consider; and a prohibition on the admission of evidence relating to a defendant's wealth until punitive liability is established. Punitive damages are proportionately *lower* under the Oregon system of pre-verdict safeguards than in other States. Honda's argument that judicial review according to a weight-of-the-evidence standard is nonetheless required flies in the face of centuries of deference to the jury and raises deep and troubling questions about the validity of capital punishment laws, jury sentencing schemes, and federal and state administrative agencies.

B. In the end, this Court need not resolve the constitutional question posed by Honda's position, because Oregon provides ample judicial review of punitive damage awards to ensure that they: (1) are consistent with federal substantive due process; (2) are not infected with legal error, such as incorrect jury instructions, admission of inflammatory evidence, or improper appeals to the jury; (3) are not the product of passion or prejudice; and (4) are supported by substantial evidence. Honda's effort to package this case as one involving the total denial of judicial review is insupportable.

II. Honda's claim that weight-of-the-evidence excessiveness review is mandated by history and the test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), is severely flawed.

A. As noted legal historians explain in an *amicus* brief supporting respondent, Honda has its history precisely backwards. At common law, jury assessment of damage awards — particularly in tort and punitive damages cases — was well-nigh final. There is no tradition of weight-of-the-evidence excessiveness review.

B. This Court has never used the *Mathews* test to evaluate an institution so historically established and so deeply entrenched in American life as the jury. Further, even assuming that the test is appropriate here, Honda cannot meet it. Honda presumes that Oregon provides no judicial review of punitive damage awards at all; this premise is utterly false. In addition, it is settled that there is no constitutional right to the kind of weight-of-the-evidence review that Honda seeks. Honda's claim that such review is necessary to check jury decisions is based on a tendentious reading of social science evidence, unwarranted optimism regarding judicial competence, and a fundamental misunderstanding of the role of the representative jury in making inherently value-laden judgments about the appropriate amounts of punitive damages. Moreover, Honda's interest — money damages — is relatively minor, while Oregon's interests — affirmance of the importance of the jury and reduction of unnecessary new trials — are enormous.

C. The provision of the Oregon Constitution attacked in this case, Article VII, § 3, applies not just to punitive damage awards, but to *all* factual issues in all civil and criminal proceedings in Oregon. If this Court were to accept Honda's argument, there would be no principled means of limiting the decision to the punitive damages context. For example, the current preference in many jurisdictions of allowing weight-of-the-evidence review (under Fed. R. Civ. P. 59(a) and Fed. R. Crim. P. 33 and similar state rules) would become a matter of constitutional right — thus granting all civil litigants and all criminal defendants a permanent due process right to at least one new trial whenever trial or appellate judges believe that the jury's verdict is against *the weight of the evidence*, even though *sufficient evidence* concededly exists to support the verdict and all other procedural protections have been satisfied. Every criminal conviction now pending on direct review from Oregon, and from the eight other States which do not provide weight-of-the-evidence review, would have to be vacated and remanded for judicial review according to Honda's new standard.

The Due Process Clause does not require such absurd results. The system of judicial review practiced in Oregon since 1910 clearly comports with due process.

ARGUMENT

I. THE DECISION BELOW COMPLIES WITH *HASLIP* AND *TXO*

Honda brings a *procedural*, rather than *substantive*, due process challenge to the judgment below. "Honda is not pressing a federal substantive due process argument in this Court; rather, the contention is that the denial of any excessiveness review in the Oregon courts deprived Honda of *procedural* protections to which it is entitled." Reply Br. in Support of *Cert.* at 2 (emphasis in original). Honda's claim is apparently that the money it would otherwise pay in damages is "property" protected by the Fourteenth Amendment. Pet. Br. at 19 n.13.[14]

But Honda and its *amici* disagree over the "process" that is "due" as a matter of the Fourteenth Amendment. Honda asserts a right to judicial review of whether a damage award is against the weight of the evidence under the "state-law standards governing the entitlement to compensatory damages and the imposition of punitive damages" — "standards that ordinarily would be more precise or exacting in various particulars than whatever comparatively modest limitations may be imposed on damages by substantive due process. Accordingly, the first line of inquiry would be whether the verdict is excessive *under standards imposed by state law*." Pet. Br. at 3 (emphasis added).

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[14] There would be no basis whatsoever for supposing that state-created substantive limits on damage awards by juries constitute "entitle[ments]", Reply Br. in Support of *Cert.* at 2, that carry with them, as a matter of *federal* due process, a *procedural right to judicial review*. Unlike state-created interests in "property" or "liberty," where a faintly similar argument has carried the day as a procedural right to a hearing before some neutral factfinder (*not* necessarily a judge), *see Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 540-41 (1985); *but see id.* at 559-63 (Rehnquist, now C.J., dissenting), state-created limits on jury behavior, like other state rules constraining official conduct in ways beyond those demanded by federal law, are not a species of "liberty" or "property" at all, much less species of liberty or property whose deprivation can be effected only by state *judicial* action. Otherwise, mere state-law violations would automatically become federal constitutional claims. *But see TXO*, 113 at 2721 n.24 (plurality opinion); *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1992); *Snowden v. Hughes*, 321 U.S. 1, 11-12 (1944); *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 520 (1885).

Honda's *amici*, however, would have this Court promulgate its own constitutional standard of "excessiveness" mirroring the "reasonableness" test that both *Haslip* and *TXO* used as the touchstone of the *substantive due process* inquiry. *See* 113 S. Ct. at 2720 (plurality opinion); 499 U.S. at 18.[15] The *amici* propose, as part of this new "excessiveness" test, various "objective indicia" identified in *TXO* as bearing on the *substantive* due process inquiry. 113 S. Ct. at 2718-23 (plurality) In effect, the *amici* would simply recast "the 'substantive due process' argument . . . in 'procedural due process' terms." *Reno v. Flores*, 113 S. Ct. 1439, 1450 (1993).[16]

There is no warrant for using procedural due process to construct a novel and vague constitutional "excessiveness" test out of whole cloth, as the *amici* suggest, or to create the right to state-law weight-of-the-evidence review that Honda seeks. Even if *Haslip* and *TXO* had not already provided sufficient guidance in the punitive damages area, this case would offer no opportunity for going further.

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[15] *See, e.g.*, Br. of American Council of Life Insurance, *et al.*; Br. of Washington Legal Foundation; Br. of Product Liability Advisory Council, *et al.* Also misguided is the *amicus* brief by CBS, Inc. and other leading media interests which raises concerns about punitive damages awards in defamation cases and argues for special restraints on such awards given the First Amendment values involved. That brief fails to mention that Oregon has been a leader in championing the very points advanced by these *amici*; long ago the Oregon Supreme Court invoked its version of the First Amendment to institute an outright *ban* on punitive damages in defamation actions. *E.g.*, *Hall v. The May Dept. Stores*, 637 P.2d 126, 147 (Or. 1981); *Wheeler v. Green*, 593 P.2d 777, 789 (Or. 1979).

[16] The redundancy between the substantive due process test and the *amici*'s proposed "excessiveness" standard could hardly be otherwise. There could be no reason — aside from the sort of impressionistic decisionmaking that the Due Process Clause does not countenance — for having the "objective indicia" mandated by procedural due process deviate from their counterparts under federal substantive due process.

A. Oregon Law Provides Ample Constraints on Jury Discretion

1. Oregon Provides Extensive Pre-Verdict Procedures

In *Haslip* and *TXO*, this Court made clear that the Due Process Clause does not require States to adopt any specific set of procedures for imposing punitive damages. There is no constitutional blueprint. Rather, the Court indicated that the relevant test is whether a state scheme, *as a totality*, imposes "a sufficiently definite and meaningful constraint" on fact-finder discretion in awarding punitive damages. *Haslip*, 499 U.S. at 22. "As long as the discretion is exercised within reasonable constraints, due process is satisfied." *Id.* at 20.

Honda seizes on one aspect of Oregon's system — the denial of excessiveness review under a weight-of-the-evidence standard.[17] But "it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision" of a challenged state scheme. *Santosky v. Kramer*, 455 U.S. 745, 775 (1982) (Rehnquist, now C.J., dissenting). Rather, "[c]ourts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards." *Id.* (emphasis in original).

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[17] Honda's claim that Oregon stands alone among the States in refusing to provide weight-of-the-evidence excessiveness review is incorrect. *See, e.g.*, Annot., *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 ALR 5th 195, 273-75 (1993) (listing 20 States in which "courts have adopted the view that the amount of punitive or exemplary damages awarded in an action involving personal injury or death is left to the sound discretion of the trier of fact, and absent a showing of passion or prejudice such award will not be set aside on the grounds of excessiveness or inadequacy").

Moreover, Honda's claim that all other States "afford[] appellate review of a trial court's denial of a new trial or remittitur," Pet. Br. at 16 n.11 (citing *Dagnello v. Long Island R.R.*, 289 F.2d 797, 798-99 & n.1 (2d Cir. 1961)), reveals a fundamental misunderstanding of what is at issue here. Article VII, § 3 does not concern the power of appellate courts to review the denial of new trial motions by trial judges, but rather the treatment to be accorded facts found by juries. In any event, the traditional rule, which persisted from the framing of the U.S. Constitution until the middle of this century, was that appellate courts did *not* have the power to review the denial of new trial motions by trial courts. *See* note 34, *infra*. The traditional limit on the power of appellate courts has largely eroded, but not because of any suggestion that it violated due process.

Oregon offers extensive pre-verdict protections for defendants, which surpass those of almost every other State. In States where instructions and other trial-level procedures leave juries with broad discretion, judicial review is thought necessary as a remedy to "check" on excessive jury discretion. *Haslip*, 499 U.S. at 20.[18] But the problem of excessive discretion never *arises* in Oregon in the first place.

For example, in this case, Honda enjoyed the right to test the sufficiency of Oberg's proof as to any of his claims (including his claim for punitive damages) at the close of plaintiff's case, again at the close of all evidence, again in its post-trial motion, and again on appeal;[19] the right to raise any asserted legal errors in the trial court and to seek review of all such rulings; and the right to file all the motions that are detailed in the procedural history, pp. 6-12, *supra*.

Further, Honda enjoyed trial-level protections imposing strict limits on jury discretion in awarding punitive damages — stricter than those available in virtually any other State and precisely the sort of pre-verdict prophylactic safeguards that Justice O'Connor advocated in *Haslip*.[20] Partly as a result of a "tort-reform" statute enacted in 1979, Oregon law:

- requires plaintiffs to plead specific amounts in each category of damages and limits the recovery in each category to the sums pleaded, ORCP 18B; Pet. Br. at 5 n.2;

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[18] Ironically, opponents of punitive damages have typically disparaged the ability of judicial review to provide an effective check on jury discretion. *See* note 56, *infra*.

[19] Oregon courts are vigilant in striking punitive damages altogether where punitive liability is not established. *E.g.*, *Badger v. Paulson Investment Co.*, 803 P.2d 1178, 1186-87 (Or. 1991); *Andor v. United Airlines*, 739 P.2d 18, 24-25 (Or. 1987); *Schmidt v. Pine Tree Land Development Co.*, 631 P.2d 1373, 1376 (Or. 1981); *Chamberlain v. Jim Fisher Motors*, 578 P.2d 1225, 1228 (Or. 1978); *Wilson v. Tobiassen*, 777 P.2d 1379, 1383 (Or. App. 1989).

[20] *See* 499 U.S. at 57-59 (O'Connor, J., dissenting) (arguing that state courts should give detailed jury instructions that would "provide [juries] with specific standards to guide their discretion;" urging them to adopt the standard of clear-and-convincing evidence; and concluding that "[d]ue process requires only that a jury be given a measurable degree of guidance, not that it be straitjacketed into performing a particular calculus").

- mandates, in product liability actions such as this one, detailed jury instructions based on extensive statutorily established criteria;
- requires that "a claim for punitive damages shall be established by clear and convincing evidence," ORS 30.925(1), 41.315(1); and
- provides that "evidence of the financial condition of a party shall not be admissible until the party seeking such damages has presented evidence sufficient to justify to the court a prima facie claim of punitive damages." ORS 30.925(2), 41.315(2).

Honda barely mentions these procedural safeguards in its brief, even though they radically transform the posture of its claim. Indeed, so effective are the safeguards from the defendant's perspective that, prior to the verdict in this case, there were no reported punitive damages decisions in product liability cases in all of Oregon during the ten-year life history of the statute.

Although Honda and its *amici* rely heavily on empirical evidence, Pet. Br. at 27-28; WLF Br., they never ask the most obvious question: Are punitive damage awards typically higher in Oregon than in other States? Given the supposed absence of procedural checks in Oregon, one would think that awards would be astronomical there. In fact, the evidence shows that Oregon awards are dramatically *lower* than those in most other States: punitive damages are rarely awarded in products liability actions in Oregon (only twice in 25 years, including the case at bar); the size of the mean punitive damages award in Oregon is less than half that of the national mean; of the 45 States allowing punitive damages, Oregon ranks in the bottom half in both total awards and per capita awards; and the amount of punitive damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide. *See* Brief *Amicus Curiae* of Trial Lawyers for Public Justice ("TLPJ Br.").

One conclusion is inescapable that — regardless of the absence of the single, specialized form of review that Honda seeks — the Oregon system as a whole functions remarkably well in restraining overall damage awards. There simply is no reason to tinker with an Oregon system that isn't broken. The Due Process Clause is not some sort of "rigid code of procedural necessities," *Walters v. Nat'l*

Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985), that automatically requires a weight-of-the-evidence standard for reviewing damages.

2. There is No Constitutional Basis For Honda's Proposed Requirement of Judicial Review of Damage Awards

Honda's position is that no system of pre-verdict constraints, "no matter how detailed and narrowly focused, could obviate the need for judicial excessiveness review" because the jury simply cannot be trusted to follow its instructions. Pet. Br. at 31. But Honda waived this claim below, *see* p. 12, *supra*, and in any event the argument is flawed for reasons discussed in Part II-B, *infra*. Even assuming the correctness of Honda's criticism of the jury, its argument would require this Court to decide an unsettled and far-reaching question of constitutional law.

There is clearly no federal constitutional right to trial by judge. *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959) ("the right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court"). Throughout American history due process has never been thought to preclude Congress and the States from vesting final decisionmaking authority over particular issues (especially factual ones) in juries and other non-judicial decisionmakers. "The States are free to allocate functions between judge and jury as they see fit," *Stein v. New York*, 346 U.S. 156, 179 (1943); *Jackson v. Denno*, 378 U.S. 368, 391 n.19 (1964) (no requirement that judge decide "constitutional fact" of voluntariness), or to dispense with judicial methods of dispute resolution altogether. *Hardware Dealers Mut. Fire Ins. Co. v. Glidden*, 284 U.S. 151, 158 (1931).

Indeed, there is no federal constitutional definition of a state "judge," *cf. Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), or of a state judge's role. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 479 (1981) (Stevens, J., dissenting) ("The functions that a state court shall perform within the structure of state government are unquestionably matters of state law"); *see also* 449 U.S. at 463. State judges can be elected, appointed, or selected in just about any way the State chooses. What can Honda's asserted right to "judicial" review possibly mean if a State could have a neutral

layperson (perhaps otherwise known as a "juror") perform the function of reviewing punitive damage awards for excessiveness?

(a) At the time of the framing of the Fifth Amendment's Due Process Clause, the jury had the power to decide questions of both law and fact in civil as well as criminal cases. *See* Brief of Legal Historians as *Amici Curiae*.[21] "[S]o strongly felt was the jury's role . . . that, at an earlier point in this country's history, some of the States deemed juries the *final arbiters* of all questions arising in criminal prosecutions, whether factual or legal." *Johnson v. Louisiana*, 406 U.S. 356, 374 n.11 (1972) (Powell, J., concurring) (emphasis added). In federal criminal cases, juries were given control over legal questions even though there was no right of appeal from federal convictions until 1889, when Congress granted a writ of error in capital cases (extended in 1891 by the Evarts Act to "otherwise infamous crimes"). Quite plainly, the framers of the Fifth Amendment did not share Honda's view that due process demands strict judicial control of the jury.

The framers' view did not disappear in the nineteenth century. For example, in 1822 Mississippi enacted a statute making the jury's assessment of damages in slander suits final and binding. In

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[21] "At the time the Fifth Amendment was adopted, juries in America, 'unlike juries today, usually possessed the power to determine both law and fact.' . . . Although the practice of permitting juries to determine the law of the case has since been abandoned, the change occurred through common law development and legislative enactment — not because due process was thought to require it." Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L. Rev. 859, 899-900 (1991) (citation omitted). For example, Chief Justice John Jay, in conducting a civil trial in which a State was a party, instructed a jury that it had the authority "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794); *see also Bingham v. Cabot*, 3 Dall. 19, 33 (1795) (Iredell, J.) (explaining in civil case that "though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them"); *Coffin v. Coffin*, 4 Mass. 1, 25 (1808) (noting, in civil action for slander, that "[t]he issue involved both law and fact, and the jury must decide the law and the fact"). In fact, the jury's power to decide the law in federal criminal cases was not conclusively denied until *Sparf v. United States*, 156 U.S. 51, 102 (1895), where the Court rejected the practice as ill-advised — but made no suggestion that such state practices were unconstitutional. In an exhaustive dissent, Justice Gray detailed the long history of jury's power to decide legal issues, reaching back to the earliest common law. *Id.* at 114-68. *See Wyley v. Warden*, 372 F.2d 742, 746 & n.7 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967).

Lewis v. Black, 27 Miss. 425 (1854), the Mississippi High Court of Errors and Appeals upheld the denial of a new trial motion for excessive damages on the ground that "[t]he courts have no authority to set aside a verdict in actions under the statute, on account of alleged excess in the damages awarded by the jury. The statute provides expressly that the jury in such cases shall 'be the sole judges of the damages sustained.'" *Id.* at 436.

In *Chicago, Rock Island & Pacific Ry. v. Cole*, 251 U.S. 54 (1919) (Holmes, J.), this Court upheld a provision of the Oklahoma Constitution providing that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left for the jury." *Id.* at 55. The Court held that due process permitted the State to leave the issue "wholly to the jury."[22]

(b) This Court has upheld capital punishment schemes vesting final authority in the jury to decide whether to impose the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 166 (1976) ("In jury cases, the trial judge is bound by the jury's recommended sentence").[23] To be sure, those systems typically provide for appellate review of the sentencing decision, but such review has not been deemed constitutionally required and thus cannot be used to

[22] "There is nothing . . . in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court." 251 U.S. at 56. "Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and . . . the notion is not a novelty." *Id.* It is of no moment that contributory negligence was an affirmative defense in *Cole*, whereas Oregon has chosen to make the factors of ORS 30.925 elements of the plaintiff's case in proving punitive damages. Especially in civil cases, States have wide discretion in assigning issues as affirmative defenses or parts of the plaintiff's case.

[23] This Court has upheld capital sentencing systems in Texas, California, Pennsylvania, and Oregon that preclude the trial judge from substituting her judgment for the jury's decision to impose the death penalty. *Jurek v. Texas*, 428 U.S. 262, 269 (1976); *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990); *Boyde v. California*, 494 U.S. 370, 374 (1990). This Court has already declined to review a judgment affirming the application of Art. VII, § 3 to death penalty cases. *State v. Wagner*, 752 P.2d 1136, 1170, 1176 (Or.), *cert. granted*, 492 U.S. 914 (1988), vacated and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989), *aff'd*, 786 P.2d 93 (Or.), *cert. denied*, 498 U.S. 897 (1990).

support Honda's argument that due process demands judicial review of a jury's factual findings.[24] Similarly, throughout American history many States have permitted the jury to function as sentencer by fixing the maximum term of incarceration with only minimal guidance from the legislature, despite the traditional rule that, "once it is determined that a sentence is within the limits set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). "Nothing in the Due Process Clause" intrudes on the choice of States "in dividing [sentencing] responsibility between judge and jury." *Chaffin v. Stynchcombe*, 412 U.S. 17, 22 (1973).

(c) "[D]ue process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of [civil fines] depends." *Lloyd Saubado Societa v. Elting*, 287 U.S. 329, 335 (1932). It is hard to see how due process could mandate that judges ultimately determine the amounts of civil damages. Moreover, Congress has vested administrative agencies with final and binding decisionmaking authority over many questions, especially factual ones.[25] Honda's argument would require that judicial review be

[24] *Evitts v. Lucey*, 469 U.S. 387, 409 (1985) (Rehnquist, now C.J., dissenting) ("There is n[o] constitutional requirement that a State provide for any appeal at all. 'It is wholly within the discretion of the State to allow or not to allow such review.' If a State decides to confer a right of appeal, it is free to do so 'upon such terms as in its wisdom may be deemed proper.'") (citations omitted); *see also Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990); *Murray v. Giarratano*, 492 U.S. 1, 18 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-58 (1987); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Ross v. Moffitt*, 417 U.S. 600, 606, 610-11 (1974); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

[25] *E.g.*, Micronesian Claims Act of 1971, Pub. L. No. 92-39, § 201, 85 Stat. 92, 96 (expired 1976); Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889, repealed by Act of June 27, 1952, ch. 477, § 403(a)(13), 66 Stat. 163, 279. Congress has also withdrawn federal courts' jurisdiction to review "final" determinations by administrative agencies. *E.g.*, 38 U.S.C. § 211(a); 42 U.S.C. § 405(h). Other statutes, apparently directed at state as well as federal courts, provide that certain agency decisions are "not subject to review . . . by a court." *E.g.*, 5 U.S.C. § 8128(b); 22 U.S.C. § 1623(h); *see also* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 377 n.43 (1968).

This Court has not found statutory provisions precluding judicial review of such agency determinations to be constitutionally problematic. *E.g.*, *United*

available not only to entertain system-wide constitutional challenges to administrative schemes, but also to review the factual predicate for individual benefit determinations and other case-by-case decisions by those agencies. States, which are not bound by the Seventh Amendment, have even greater latitude than Congress in assigning matters to administrative agencies without affording judicial review of factual determinations. *E.g.*, *Crowell v. Benson*, 285 U.S. 22, 42, 57 (1932); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235, 238-39 (1917); *Markham v. Clark*, 978 F.2d 993, 995 (7th Cir. 1992).[26] And, even when some sort of hearing is required, this Court has frequently found that nonjudicial procedures provide all the process that is due, even where interests far more substantial than mere money damages are at stake. *Washington v. Harper*, 494 U.S. 210, 231-33 (1990); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *Parham v. J.R.*, 442 U.S. 584, 607 (1979); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 13-14 (1979).

Honda's position thus appears to have no merit. In the end, however, this Court need not decide the question, because Oregon does in fact provide extensive judicial review of punitive damage awards.

B. Oregon Permits Judicial Review of Punitive Damages Awards

Honda's claim that Oregon law places "no check on juries" and embodies a "categorical renunciation" of judicial review, and that it "entrusts unreviewable authority to jurors," Pet. Br. at 11, is a gross distortion. Indeed, Honda's argument is prima facie disproven by the procedural history of this very case, in which

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States v. Fausto, 484 U.S. 439, 447 (1988); *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48 (1984); *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982); *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975).

[26] Suppose a State provided a rational, quantified formula for compensation (or exemplary damages, or a civil penalty) in a statutory scheme, such as a workers' compensation or anti-discrimination law, to be administered by a special tribunal with full adjudicatory due process, but denied any judicial review beyond errors in law or statutory interpretation. Surely the lack of judicial review for evidentiary sufficiency would raise no due process question. *See, e.g.*, *Crowell v. Benson*, 285 U.S. at 42.

Honda itself raised passion-and-prejudice, substantial evidence, and other objections in the Oregon courts, and where no court held that such judicial review of damages was unavailable in Oregon.

1. Oregon Courts Have the Power to Review Federal Substantive Due Process Challenges to Punitive Damages Awards

Although Honda raises only a *procedural* due process claim, it also suggested in its petition for *certiorari* that Oregon courts "refus[e]" to "entertain and pass on the federal-law contention that a particular punitive verdict is so grossly excessive as to violate federal substantive due process." Pet. for *Cert.* 16 n.10. Notably, Honda does not repeat this allegation in its brief on the merits. There is a good reason for the change in argument: no Oregon court has *ever* held that it lacks the power to entertain a federal substantive due process challenge to a punitive damages award.

Indeed, even though it is debatable whether Honda properly framed a federal substantive due process claim below,[27] it is clear from the Oregon Supreme Court's opinion that the court *did in fact* test the punitive damages award by federal substantive due process standards — just as that court has been careful to respect the Supremacy Clause by applying federal "excessiveness" review in FELA and related cases. *See, e.g.*, *Staples v. Union Pacific R.*, 508 P.2d 426, 426 (Or. 1973). Although its decision in the case below predated *TXO*, the Oregon court explicitly recognized the difference between procedural and substantive due process and explained that the latter "relates to the requirement that the amount of the award be proportional to the defendant's conduct and may also be implicated when multiple awards of punitive damages are made against the same defendant for the same course of conduct." Pet. App. 20a n.10. The court also recognized its duty to "ensure that an award of punitive damages . . . bears a rational relationship

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[27] *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Honda's federal due process arguments were limited to *procedural* due process and, while it contended in general terms that the award was constitutionally "excessive," the only federal constitutional provision it invoked was the Eighth Amendment's Excessive Fines Clause. *See, e.g.*, Honda New Trial Mot. at 58; Honda Ct. App. Br. at 39; Honda Ore. Sup. Ct. Br., filed Aug. 27, 1991, at 1-2.

to a defendant's conduct and to the need for punishment and deterrence." *Id.* 28a.

The court further explained that, "'[u]nder *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable.'" *Id.* (citation omitted). But the court noted that in this case the proportions between the punitive award, on the one hand, and the plaintiff's compensatory damages and out-of-pocket loss, on the other, were "similar" to what they were in *Haslip* and were therefore no cause for constitutional concern.[28] With the additional guidance of *TXO*, it is obvious that the Oregon Supreme Court's decision not to upset the award on federal substantive due process grounds was in fact correct. The award here is demonstrably reasonable in light of Honda's "bad faith," 113 S. Ct. at 2722,[29]

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[28] The Oregon Supreme Court explained that:

> In *Haslip*, the Court stated that the award of punitive damages, which was upheld, was more than 4 times the amount of compensatory damages and more than 200 times the amount of out-of-pocket expenses of the plaintiff. 111 S Ct at 1046. The proportions here are similar. The award of punitive damages here is about 5.4 times the amount of compensatory damages and about 258 times the amount of out-of-pocket expenses of plaintiff.

Pet. App. 29a n.14.

[29] There was ample evidence that Honda's actions manifested "wanton disregard for the health, safety and welfare of others." ORS 30.925(1). As early as the 1970s, Honda knew, according to testimony of its former regional sales manager, that 3-wheeled ATVs were particularly unstable and prone to tipping over. Tr. 5:472-74, 480-81. Honda officials suggested specialized rider training, which the company rejected. Tr. 5:475-77. Its district service managers, who had responsibility for accident investigation, warned Honda that increasing engine size would exacerbate the tendency of ATVs to tip over backwards (the very kind of accident at issue in this case). Tr. 4:116-17. Nonetheless, Honda embarked on a strategy of developing larger and larger engines for 3-wheelers in order to out-compete other manufacturers with "bigger, faster, sexier" models. Tr. 5:478-79, 521.

In addition, it is undisputed that Honda was in receipt of documents from the Consumer Product Safety Commission detailing the instability of all-terrain-vehicles, *see* Pet. App. 3a-8a, which prove that Honda knew that, as of the date of Karl Oberg's accident, ATVs had caused injuries serious enough to warrant hospitalization to hundreds of thousands of people, as well as over a thousand deaths. Despite all these sources of notice to Honda that its

the fact that the wrongdoing here was "part of a larger scheme" to injure the public, *id*, and Honda's wealth. *Id.* at 2722 n.28.[30]

The federal substantive due process review performed by the Oregon court shows that Honda's efforts are misdirected. Whether excessiveness review under state-law criteria would *reduce* punitive awards is not the issue. The question is whether Oregon's system of constraints on jury discretion, coupled with judicial review according to a federal substantive due process standard, meets the constitutional minimum. Honda has not even addressed that question.[31] The striking similarities between the federal substantive due process review provided by Oregon and traditional excessiveness review, *TXO*, 113 S. Ct. at 2726 n.1 (Scalia, J., concurring in the judgment), suggest that Honda can have no due process complaint. Indeed, the statutory factors with which Oregon juries are instructed, *see* note 4, *supra* — which would provide the basis for any state-law excessiveness argument by Honda — are virtually the same "objective indicia" that compose the federal substantive due process test.

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vehicles were dangerous, and the tens of thousands of injuries that were occurring yearly, it continued to insist that its vehicles were perfectly safe and that every single accident was a result of rider misuse. Tr. 20:2197-98.

[30] *See* notes 2, 3 and 5, *supra*. Substantive due process plainly permits a jury to consider a corporation's wealth in assessing punitive damages. *See TXO*, 113 S. Ct. at 2722 n.28 (plurality opinion); *Haslip*, 499 U.S. at 21-22; *Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); *New Orleans, J. & Great N. R. Co. v. Hurst*, 36 Miss. 660, 669 (1859); *Belknap v. Boston & M. R. Co.*, 49 N.H. 358, 374 (1870); *Cumberland Tel. & Tel. Co. v. Poston*, 30 S.W. 1040, 1041 (Tenn. 1895); 1 J.G. Sutherland, A Treatise on the Law of Damages 745 (1883).

[31] Honda's *amici* dramatically undercut any claim that Honda might belatedly advance on this score. For example, one *amicus* brief signed by Dean Griswold states that review according to a "reasonableness" standard (which Oregon, of course, provides) "ensure[s] that litigants are not subjected to punitive damages that are constitutionally excessive and that punitive damages — when warranted — are awarded in amounts that reasonably serve their deterrent and punitive purposes." Br. of American Council of Life Insurance, *et al.* at 18. There is thus little need for "excessiveness" review under state-law criteria.

2. The Oregon Supreme Court Has the Power to Adjust Damages Awards in Any Case in Which Legal Error Has Occurred

In its claim that Oregon law never permits courts to question the amount of damages awarded by a jury, Honda fails to mention a striking feature of the Oregon Constitution that would be the solution to all its objections that the trial was unfair — that is, if Honda's objections had any merit. Art. VII, § 3 provides that

> if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of the opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered.

Thus, in a case where error has been committed during the trial — as Honda insists occurred here — the state supreme court, instead of reversing the judgment and sending the case back to the circuit court for retrial (as the Oregon Supreme Court most commonly does), may instead "direct" the amount of damages to be paid. *See* Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or. L. Rev. 1, 16-20 (1955) (citing 15 cases); *see also Sol-O-Lite Laminating Corp. v. Allen*, 353 P.2d 843, 850 (Or. 1960).

If Honda had pursued in the Oregon courts the sorts of objections to the jury instructions that Honda now seeks to raise before this Court, Pet. Br. at 26, 32-33, and if those claims had any merit, then Honda could have requested the Oregon Supreme Court to readjust the damages award rather than reverse and remand. The same is true regarding Honda's new-found argument that plaintiff's summation was improper. Pet. Br. at 4, 25. Honda asserts here that it was these legal errors that triggered the punitive damages verdict and that necessitate "excessiveness" review according to a weight-of-the-evidence standard. Pet. Br. at 24-26, 32-33. But it is quite disingenuous for Honda now to invoke discredited state-law claims — which we show elsewhere are procedurally barred and in any event without merit — to argue that the procedure it received was inadequate, for the simple reason that if those claims had any basis the Oregon Supreme Court would have had the authority to employ even more searching review than Honda seeks here.

3. Oregon Courts Have the Power to Review Punitive Damages Awards under a "Passion-or-Prejudice" Test

In addition, Honda fails to apprise this Court of the power of Oregon courts, so heavily relied on by Honda in its new trial motion and in its brief in the court of appeals, *see* pp. 6-10, *supra*, to reduce punitive damage awards where it appears "either from the size of the verdict itself or from any incident of the trial, that the damages were given under the influence of prejudice and passion." *Van Lom*, 210 P.2d at 468 (citing cases). Although in an appropriate case there might be debate over the extent of this power in Oregon, on the record of this case this Court must assume that Oregon courts engage in "passion-or-prejudice" review.[32]

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[32] Although the impact of Art. VII, § 3 on passion-or-prejudice review has never been definitely settled in Oregon, no less an authority than Justice McBride, who drafted the 1910 amendment that became Art. VII, § 3, explained that "in a case where the verdict is so outrageously beyond the proven facts as on its face to indicate passion or prejudice, and, especially, where impassioned and demagogic appeals to the jury have a tendency to arouse passion or prejudice, the courts have a right to set aside a verdict." *Donaghy v. Oregon-Washington R. & Nav. Co.*, 288 P. 1003, 1014 (Or. 1930). *See also Foley v. Pittenger*, 503 P.2d 476, 477 (Or. 1972) (reversing new trial — granted by trial court solely on the ground that the "excessive damages . . . appear[ed] to have been given under the influence of passion and prejudice" — not because trial court lacked such authority but rather because "[w]e have examined the record in this case" and cannot say "'either from the size of the verdict itself or from any incident of the trial, that the damages were given under the influence of prejudice and passion'") (quoting *Van Lom*; *Huston v. Trans-Mark Services, Inc.*, 609 P.2d 848, 854 (Or. App. 1980) (rejecting new trial motion because "defendant has failed to present any evidence . . . that the verdict was influenced by passion and prejudice" and "[h]ere, after examining the record, we find there was evidence to support the jury verdict as to the damage award"); *Brewer v. Erwin*, 658 P.2d 1180, 1182 (Or. App. 1983) (refusing to grant new trial on passion and prejudice grounds, finding that there was "no basis for [defendant's] conclusion" that "the jury's verdict was the result of passion and prejudice").

Even when Oregon civil procedure statutes were revised after the 1910 adoption of Art. VII, § 3, the statutes continued to refer to "passion and prejudice" as a basis for new trials. Subd. 5, § 5-802, O.C.L.A., *as revised*, ORS 17.610(5). In 1980, the Oregon statutes governing trial procedure were replaced by the Oregon Rules of Civil Procedure, and the express reference to "passion and prejudice" disappeared. But the move from statute to rules was intended to systematize civil procedure, not to "abridge, enlarge, or modify the substantive rights of any litigant." ORS § 1.735 (1985); Merrell, *The Oregon Rules of Civil Procedure — History and Background, Basic Application, and*

The basis for such an assumption is that in this case Honda indisputably enjoyed the benefit of "passion-or-prejudice" review in the proceedings below. Honda raised a passion-or-prejudice claim in its new trial motion in the trial court, where Oberg answered the claim *on its merits* and the court denied the motion in a written decision with no suggestion whatsoever that it lacked the power to entertain the passion-or-prejudice claim. *See* pp. 6-11, *supra*. Although the court did not elaborate its reasons for decision, it was not required to do so. *See TXO*, 113 S. Ct. at 2724 (plurality opinion). If Honda wanted a fuller explanation, it could have requested one. It did not. Honda now apparently expects this Court to presume that the trial court denied its motion on the ground that passion-or-prejudice review is unavailable under Oregon law, but there is absolutely no foundation for such an conclusion. *See* note 32, *supra*.

When the trial court passed on its passion-and-prejudice claim, Honda's procedural due process rights were fully satisfied, even under its own theory of what it is owed.[33] Because there is no due process right to appellate review of a denial of a new trial motion,[34] Honda's interests would have been fully vindicated even

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the "Merger" of Law and Equity, 65 Ore. L. Rev. 527, 533 (1986). Hence, the change cannot be read as eliminating passion and prejudice review. *See Finley v. United States*, 490 U.S. 545, 554 (1989). Indeed, the new Rules of Civil Procedure authorize new trials in the event of jury "misconduct" or any "[i]rregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial." ORCP 64B(1), (2). Appellate courts retain broad authority to order a new trial "if necessary and proper." ORS 19.130(1). And Oregon courts enjoy inherent common-law authority in any event. *See* Merrell, *supra*, at 538-41.

[33] Passion-or-prejudice review would eliminate Honda's procedural due process objection, because by definition it provides relief in those instances, if any, where juries are "biased" or "shaped by influences impermissible in our system of justice" or where juries base their decisions on "prejudice" against wealthy or foreign defendants. Pet. Br. at 23-26. Indeed, "passion and prejudice" standard is in truth the very common-law test that Honda claims to advocate. *See, e.g., TXO*, 113 S. Ct. at 2730 & nn.1, 2 (O'Connor, J., dissenting); Brief of Legal Historians.

[34] For 159 years, § 22 of the Judiciary Act of 1789 and its successors allowed appeal only on "writ of error." *See* 1 Stat. 84 (1789); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev.

if the state court of appeals and supreme court had ruled that passion-or-prejudice review does not exist in Oregon. In fact, neither appellate court cast doubt on the availability of passion-or-prejudice review. Both courts simply noted that the jury's judgment was adequately supported by the evidence. *See* Pet. App. 33a; *id* at 87a. Each of the three grounds advanced as supporting the passion-or-prejudice claim was reviewed and denied on appeal. *See* notes 7-10, *supra*. Because Honda invoked passion-or-prejudice review in its post-trial motion, and because there is no indication that the court refused to entertain that claim on its merits, reversal of the judgment below on the theory that Oregon law barred such review is out of the question.

4. Oregon Courts Also Have the Power to Review Damages Awards to Determine Whether There Is Substantial Evidence to Support the Jury's Measure of Damages

By its terms, Article VII, § 3 of the Oregon Constitution does not withdraw all powers of judicial review over damages awards. Rather, it provides in relevant part that:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, *unless the court can affirmatively say there is no evidence to support the verdict*.

(emphasis added). Oregon courts have made clear that they do not

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49, 61-62, 102-05 (1923). This Court's numerous decisions prior to 1948 (when § 22 was finally repealed) refusing to review denial of new trial motions, *see, e.g., Southern Railway-Carolina Division v. Bennett*, 233 U.S. 80, 87 (1914); *Wabash Ry. v. McDaniels*, 107 U.S. 454, 456 (1882); *Railroad Co. v. Fraloff*, 100 U.S. 24, 81-82 (1879), were obviously consistent with due process. Moreover, the Seventh Amendment may bar federal appellate review of such new trial motions, an issue this Court has never decided. *See Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir. 1961) (Blackmun, J.); Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 240 n.7, 243-44, 316-18 (1989).

follow a scintilla rule and that the question is "whether there was any *substantial evidence*" to support the verdict.[35]

Honda stakes its entire case on the assertion that this power is limited to assessing the sufficiency of evidence to support punitive liability, not the amount of damages. Pet. Br. at 8 n.5, 30-31 n.23. But Honda never supports its assertion. Under Oregon law, the appropriate amount of punitive damages is a question of fact to which the "substantial evidence" standard applies.[36] Thus, contrary to Honda's suggestion, Oregon courts have in fact vacated damage awards on the ground that the amount imposed by the jury was not supported by substantial evidence. *See, e.g., Roberti's House of Wines v. Somerset Wine Co.*, 703 P.2d 976, 979 (Or. 1985).[37]

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[35] *Fowler v. Courtemanche*, 274 P.2d 258, 275 (Ore. 1954); *Younger v. City of Portland*, 752 P.2d 262, 268 (Or. 1988).

[36] The Oregon Supreme Court has held that:

> It is impossible for the jury to arrive at the *amount* to be assessed against the defendant by way of punishment without considering and deciding questions of fact. It must determine first whether there was malice and, if so, the *degree* of that malice, both of them questions of fact. It may give consideration to all those elements enumerated in *Huckle v. Money*, [95 Eng. Rep. 768 (C.P. 1763)], and in doing so necessarily determines what are the facts.

Van Lom, 210 P.2d at 470 (emphasis added); *see also Friendship Auto Sales v. Bank of Willamette Valley*, 716 P.2d 715, 720 n.9 (Or. 1986).

Honda claims that the "considerations given to the jury in this case were not" questions of "pure fact." Pet. Br. at 33. But if the determination of the size of the punitive damages award were *not* deemed a factual matter, then Art. VII, § 3 would not limit judicial review of it *at all*. If determination of the size of the award *is* a factual question, then it is subject to review under the "substantial evidence" exception. Honda cannot have it both ways. Moreover, any complaint by Honda that the jury was given too subjective a set of criteria would amount either to a substantive due process objection, or to an objection about excessive jury discretion. Neither of those objections is before this Court.

[37] In *Huston v. Trans-Mark Services, Inc.*, 609 P.2d 848 (Or. App. 1980), for example, the court explained that, "[a]s to the excessiveness of the damage award, [*Van Lom* held that] there is no judicial review of a jury verdict merely for excessiveness of damages. . . . All a court can do, insofar as the facts are concerned, is to examine the record to determine whether it 'can affirmatively say there was no evidence to support the verdict.' Or. Const, amended Art VII, § 3. Here, after examining the record, we find there was evidence to support the jury verdict *as to the damage award*." *Id.* at 854 (emphasis added).

See also McElwain v. Kapatoff, 551 P.2d 105, 107 (Or. 1976) (rejecting claim that "excessive damages appeared to have been given under the influence of passion and prejudice" and explaining that "[t]here was evidence that plaintiff received a 50 percent compression fracture of the first lumbar vertebra which caused him to be hospitalized and to wear a body brace for several months"); *Aspuria v. Mello*, 464 P.2d 680, 683 (Or. 1970) ("Defendant's final contention that the award of $15,000 in general damages was error in the absence of evidence of permanent disability or the degree and amount of pain and suffering is even more clearly without merit, particularly in a case in which plaintiff was hospitalized for 185 days. *See Van Lom*").

Surprisingly, Honda refers to none of these cases in its brief, even though in the trial court and court of appeals it argued strenuously for judgment as a matter of law or a new trial on the ground that the size of the verdict was not supported by substantial evidence. *See* pp. 10-11, *supra*. Now, however, it claims that the half-century-old decision in *Van Lom* precludes all such review. Honda's post-*Haslip* change in strategy is unavailing.

First, the decisions in this case are best read as recognizing the power of courts to review the amount of punitive damage awards for substantial evidence. *See* pp. 11-12, *supra*. The state supreme court left no ambiguity that, in products liability cases such as this one, judicial review focuses on the sufficiency of the evidence to support the statutory criteria enumerated in ORS 30.925.[38] That Oregon judicial review focuses on the *size* of the

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[38] The supreme court explained that:

> If there is no evidence to support the jury's decision — in this context, *no evidence that the statutory prerequisites for the award of punitive damages were met* — then the trial court or the appellate courts can intervene to vacate the award. See ORCP 64B(5) (trial court may grant a new trial if the evidence is insufficient to justify the verdict or is against law).
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> *There was evidence to support [the jury's] determination*. Accordingly, the punitive damages award in this case did not violate the Due Process Clause of the Fourteenth Amendment . . . .

Pet. App. 27a, 33a (emphasis added). By "statutory prerequisites," the court plainly meant *all* of the statutory criteria enumerated in ORS 30.925, including

punitive damage award is also confirmed by the state court's explicit parallel to federal practice in diversity cases,[39] which plainly does not involve the sort of complete ban on judicial review of the size of punitive damage awards that Honda claims is mandated by Art. VII, § 3 in the Oregon system. Honda focuses on the Oregon Supreme Court's comment that it "did not interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that *includes the possibility of a remittitur*," Pet. App. 25a (emphasis added), but Honda completely overlooks the critical qualification contained in the last clause.[40]

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the statutory factors to be used "in setting the amounts of [punitive] awards." Pet. App. 21a. These factors are akin to the special issues in capital punishment cases, where the Oregon Supreme Court has explained that the role of appellate courts under Art. VII, § 3 is to determine "whether there was evidence from which the jury could have found affirmative answers to all three questions." *State v. Wagner*, 752 P.2d 1136, 1170 (Or. 1988); *see also id.* at 1141 (listing the special issues).

[39] In discussing procedural protections available under Oregon law, the supreme court quoted the Fifth Circuit's reasoning that, "'in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for *the amount of the award*.'" Pet. App. 28a (emphasis added and quoting *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991)). The Oregon Supreme Court noted that the "the relatively narrow scope of appellate review of punitive damages awards in Oregon is similar to that available to federal appellate courts reviewing awards of punitive damages made in federal district courts applying state law in cases involving diversity jurisdiction." *Id* at 29a.

[40] The Oregon court was simply indicating that *Haslip* does not mandate that a *remittitur* procedure is constitutionally required — a conclusion that is certainly correct in light of the dubious historical pedigree of the remittitur. *See Dimick v. Schiedt*, 293 U.S. 474, 484 (1935) (noting that remittitur practice "has been condemned as opposed to the principles of the common law by every reasoned English decision, both before and after the adoption of the Federal Constitution, which we have been able to find"); *Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 673 (5th Cir. 1975) (*per curiam*) (Goldberg, J., dissenting) ("The doctrine of remittitur rests on a constitutional base of clay"); Carlin, *Remittiturs and Additurs*, 49 W. Va. L.Q. 1 (1942). Even though the remittitur has been grudgingly held to be *permitted* by the Seventh

Second, Honda exaggerates the breadth of *Van Lom*, as illustrated by the more recent Oregon cases inquiring into the sufficiency of evidence to support the size of damage awards. The question presented in *Van Lom* was whether "'[t]he *Supreme Court of Oregon* is empowered under Article VII, Section 3, Oregon Constitution, to reduce an excessive verdict.'" 210 P.2d at 462 (emphasis added and quoting defendants' brief). Accordingly, *Van Lom's* discussion of the power of a *trial court* to engage in substantial evidence review was sheer dictum, designed to "throw light on the propositions which the defendant seeks to maintain" relating to the supreme court's power. *Id.* at 463. Moreover, *Van Lom* was an assault and battery case in which the jury instructions provide no concrete guidelines for setting damages, not a products liability action governed by the statutory criteria of ORS 30.925. Even so, *Van Lom* reaffirmed that Art. VII, § 3 did not strip trial courts of all powers of post-trial damages review. Rather, what Art. VII, § 3 eliminated, according to *Van Lom*, was the "power of a trial court to re-examine the evidence and set aside a verdict because it was excessive *or in any other respect opposed to the weight of the evidence*." 210 P.2d at 465.[41]

With respect to the powers of the state supreme court, *Van Lom* noted that, under longstanding practice, appellate courts have

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Amendment, it would be untenable to suggest that it is somehow *required* by the Fourteenth. Whether States choose to adopt it is a matter of state law. *E.g., Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985).

[41] To the same effect is the court's comment that an Oregon court lacks the power "to declare that . . . the evidence does not support the verdict 'in its entirety' *simply because the court thinks that the verdict is too large*." 210 P.2d at 467. The comment meant merely that Art. VII, § 3 does not permit reviewing courts to vacate awards based on their subjective views about "excessiveness."

To be sure, *Van Lom* also rejected the argument that "the circuit courts 'have authority to grant a new trial if there is no evidence to support the verdict in its entirety, although there may be some substantial evidence that the plaintiff was damaged to some extent less than the amount of the verdict.'" *Id.* at 463 (citation omitted). But the *Van Lom* court's rejection was premised on its understanding of this argument as nothing but a weight-of-the-evidence excessiveness standard in disguise: "it is in reality only a formula under which the courts would in practice do the very thing which they were accustomed to do before Art. VII, § 3, was adopted." *Id.* at 464. Accordingly, *Van Lom's* dictum on this point fails to establish that Honda's extreme account of Oregon law is anything more than caricature.

no authority to review the refusal of a trial court to set aside verdicts which the appellate courts deem to be excessive.[42] This limit on the power of appellate courts has nothing to do with Art. VII, § 3. Honda's extensive reliance on *Van Lom* is therefore misguided, for it was in the specialized context of the limits on *appellate* review that the Oregon Supreme Court complained that "[t]he court is of the opinion that the verdict of $10,000.00 is excessive" but that the court was powerless to reduce it. 210 P.2d at 462.[43] The same appellate handwringing could have occurred in Oregon before the adoption of Art. VII, § 3,[44] and in fact in *any* federal appellate court for more than a century and a half after enactment of the Judiciary Act of 1789, which barred appellate review of the amount of damages and other factual issues. *See* note 34, *supra*.

Third, even indulging Honda's expansive reading of *Van Lom*, Honda could have challenged the amount of damages sought by Oberg *in advance* as unsupported by substantial evidence. By its terms, Art. VII, § 3 applies only to *re-examination* of facts *after* a jury has determined them initially; it presents no bar to determining, in advance, the maximum scope of the jury's authority under the law. For example, at the pleading stage Honda could have availed itself of the special Oregon rule that the complaint must specify the amount of money damages the plaintiff seeks. As Honda acknowledges, "[u]nder Oregon law, 'the amount of damage alleged in the complaint does fix a maximum limit, and [the jury is] not

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[42] *See* 210 P.2d at 465 ("'If the jury acted upon a gross mistake of fact, or were governed by some improper influence, or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. . . . Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties.'") (quoting *New York Central & Hudson R. Co. v. Fraloff*, 100 U.S. 24, 25 (1879)).

[43] To the same effect is the court's comment in *Fowler v. Courtemanche*, 274 P.2d at 275, that, if it could do so, "we would unhesitatingly hold that the award of $35,000 as punitive damages was excessive."

[44] *See, e.g., Lindsay v. Grande Ronde Lumber Co.*, 87 P. 145, 149 (Ore. 1906) (noting that refusal of trial court to "set aside the verdict because it is excessive . . . cannot be reviewed on appeal").

permitted to award plaintiff more than that amount.'" Pet. Br. at 5 n.2 (quoting jury instructions in this case).[45] Similarly, Honda was obviously free, by way of a directed verdict motion or otherwise, to put Oberg to the task *before* the verdict of demonstrating to the trial court's satisfaction that the evidence adequately supported his damages claim of $5 million. The possibility of such pre-verdict review is hardly hypothetical — Honda made several such motions in this very case. *See* note 1, *supra*.

At the instruction stage, Honda could have objected to the jury charge on the ground that it permitted the jury to return a punitive damage award of $5 million when such a sum was not supported by the evidence. *Van Lom* specifically recognized the availability of such an objection, observing that, when the court reduced the size of the damage award in *Lyons v. Browning*, 133 P.2d 599, 600 (Or. 1943), "[o]ne of the grounds of our decision was that the court erred in instructing the jury in effect that they were authorized to find a verdict for the plaintiff in the amount of $1,575.00 (the full amount prayed for) when the evidence would not support such a verdict." 210 P.2d at 467; *see also id.* (in *Weatherspoon v. Stackland*, 271 P. 741 (Or. 1928), "there was error on the part of the trial judge in submitting the case as alleged in the pleadings" when the amount of damages was not supported by the evidence). Such an objection — based on asserted legal error in instructing the jury — would in no way trigger Art. VII, § 3, which applies only to *ex post* review of facts found by "a properly instructed jury." 210 P.2d at 466.

Finally, before the jury retired for its deliberations Honda could have moved to submit a special verdict form in order to require the jury to break down the punitive damage award into its evidentiary components that could then be reviewed for substantial evidence. In the case at bar, the punitive damage issue was governed by the statutory criteria enumerated in ORS 30.925. Honda could have asked the jury to specify the criteria and evidence on which it was relying and to explain, in whatever terms Honda chose, precisely how it arrived at a particular number for the award. Each of the jury's evidentiary steps could then have been reviewed

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[45] *See, e.g., Lane v. Kelley*, 643 P.2d 1375, 1376 (Or. 1982) (upholding order of court striking plaintiffs' claim for $2,400 in damages as unsupported by the evidence in the case).

for sufficiency by the trial and appellate courts, just like any other decision by the jury in the case. The reason Honda did not do so was likely strategic; empirical evidence suggests that special verdict forms requiring the jury to proceed in this manner produce higher damage awards. Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 237-38 (1989). But Honda cannot now complain of absence of process when it chose not to avail itself of procedures offered by Oregon.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE "EXCESSIVENESS" REVIEW UNDER A WEIGHT-OF-THE-EVIDENCE STANDARD

We do not deny that procedural due process requires that a party receive notice, the opportunity to be heard, a neutral decisionmaker, and a full and fair hearing. Oregon provides such process. Moreover, Oregon guarantees that any result is (a) consonant with federal substantive due process, (b) free of legal error, (c) not the product of passion or prejudice, and (d) supported by substantial evidence. Honda, however, argues that the Constitution demands *more*: that a judge review the jury's verdict to ensure that it is consonant with the judge's individual view of the weight of the evidence as to what is "excessive." Not surprisingly, neither history nor the *Mathews v. Eldridge* test supports Honda's claim, for it would have radical and ultimately unacceptable implications for the systems of civil, criminal, and administrative law in the United States.

A. Tradition Indicates that Weight of the Evidence "Excessiveness" Review is Not Constitutionally Required

Honda's history of the judicial review of damage awards is oversimplified and misleading. As discussed in the exhaustive Brief *Amici Curiae* of Legal Historians, tradition lends no support at all to Honda's position that a "weight-of-the-evidence" standard is constitutionally mandated.

Initially, English courts had no power *at all* to grant new trials for perceived "excessiveness." Gradually they seized such power, but only in cases of jury bribery and corruption, and as late as 1764 an English court observed that "there is not one single case (that is

law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764).[46]

In the nineteenth century United States, personal injury tort awards and punitive damage verdicts were reviewed extremely deferentially, if at all. American courts observed the rule that such damages were the jury's domain. At most, courts asked whether an award was so irrational on its face as to be plainly the product of "passion and prejudice," not whether it was "excessive" simply because it was contrary to the judge's personal view of the "weight of the evidence." *E.g.*, T. Sedgwick, A Treatise on the Measure of Damages 533 (1868); *Walker v. Smith*, 4 U.S. (4 Dall.) 389 (1804) (Washington, Circuit Justice); *Thurston v. Martin*, 23 F. Cas. 1189, 1190 (1830) (Story, Circuit Justice). "[I]t has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them), to the discretion of the jury. . . . It is just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Haslip*, 499 U.S. at 24-25, 26-27 (Scalia, J., concurring in judgment).

B. *Mathews v. Eldridge* Does Not Show that Weight-of-the-Evidence "Excessiveness" Review is Constitutionally Mandated

Honda's *Mathews v. Eldridge* argument is premised on the assumption that Oregon affords no judicial review whatsoever. Pet. Br. at 21 ("in the absence of some form of judicial review, defendants will suffer an erroneous deprivation of their property"). Once this error is corrected, Honda's argument collapses. For then Honda's argument reduces to the assertion that an award that is the product of a fair proceeding free from legal error, that is not the

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[46] Granting new trials for any reason did not meet with colonial approval. "The award of new trials for any reason [was] regarded with profound suspicion by the revolutionary generation. 'The practice of granting new trials,' a Virginia judge noted in 1786, 'was not a favourite of the courts of England' until the elevation of Lord Mansfield, 'whose habit of controling juries does not accord with the free institutions of this country.'" M. Horwitz, The Transformation of American Law, 1780-1860, at 142 (1977).

result of passion or prejudice, and that is supported by substantial evidence, is nonetheless somehow "legally erroneous" or "fundamentally [un]fair," Pet. Br. at 29-30, simply because a judge would find it "excessive" in the sense that it is against his or her personal view of the weight of the evidence.

This Court has never held that a litigant has a constitutional right to a new trial on the basis of this sort of personal evaluation by a judge, even in the criminal context.[47] This Court has always indicated that "[a] hearing before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." *Pittsburgh, Cincinnati & Chi. Ry. v. Backus*, 154 U.S. 421, 426-27 (1894); *see also Pleasants v. Fant*, 89 U.S. 116, 121 (1875) (no right to weight of the evidence review). Honda's flamboyant argument, if accepted, would require this Court to overrule its unanimous decision in *Louisville and Nashville R.R. Co. v. Woodson*, 134 U.S. 614, 623 (1890), upholding the constitutionality of a practice among the States, "in force for more than sixty years before the adoption of the Fourteenth Amendment," of restricting weight-of-the-evidence review. This Court would also have to reconsider its view, which no Justice has ever questioned, that "[w]hether a state trial judge may assess evidence as a '13th juror' is a question of state law." *Hudson v. Louisiana*, 450 U.S. 40, 44 n.5 (1981); *see also Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

Moreover, it is doubtful that the *Mathews* framework applies here at all. Honda complains that "the jury applies law it doesn't

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[47] Due process has never been thought to require anything as extravagant as "weight of the evidence" review, even by federal courts in criminal cases. *E.g.*, *Thompson v. Louisville*, 362 U.S. 199, 206 (1960) ("no evidence" rule); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (whether "no rational trier of fact could have found proof beyond reasonable doubt"). Similarly, this Court has applied deferential review even with respect to factfinding relevant to a federal claim. *E.g.*, *General Motors v. Washington*, 377 U.S. 436, 442 (1965) ("substantial evidence"); *Egan v. Hart*, 165 U.S. 188, 188-189 (1897) (no power of review over facts at all). The instant case concerns Honda's ability to assert exclusively state-law claims, since the Oregon courts will entertain any federal substantive due process attacks to a punitive damage award.

understand to facts it can't get straight," and that juries are "untrained," "ignoran[t]," and "worthless." Pet. Br. at 21-22 n.16 (citations omitted).[48] But this remarkable claim ignores the systemic values at stake here. Our judicial system manifests a clear preference for "the commonsense judgment of the jury as a bulwark . . . 'against the compliant, biased, or eccentric judge.'" *Johnson v. Louisiana*, 406 U.S. 356, 373 (1972) (Powell, J., concurring). Moreover, ever since de Tocqueville, the role of the jury as an instrument of self-government has been well recognized.[49] According weight to a jury's factual findings dignifies that institution; the judicial second-guessing proposed by Honda would denigrate it. As the *amicus* briefs of the Oregon Attorney General, et al., and the Oregon Trial Lawyers Ass'n demonstrate, Art. VII, § 3 reflects many of the same values as underlie the Seventh Amendment. Honda would treat the jury system as somehow suspect, or at least as no weightier than the humdrum bureaucracy involved in *Mathews*. Such a view intrudes on the constitutionally protected authority of the States to govern themselves and to

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[48] The controversial social science cited by Honda is hardly limited to the damages context, and if Honda's arguments were accepted, the next litigant would surely claim that permitting a jury to assess damages in the first place — or perhaps even to determine liability — would violate due process in a case involving a "corporate defendant" or "well-known foreign corporation." Pet. Br. at 26.

[49] *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *see also Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 319 U.S. 372, 397-400 (1943) (Black, J., dissenting); *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979) (Rehnquist, now C.J., dissenting). "Those who emigrated to this country from England brought with them [the jury system] 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898). The jury is, in the words of legal historian and Judge Morris Arnold, "the single most important institution in the history of Anglo-American law." *The Civil Jury in Historical Perspective*, in The American Civil Jury 9-10 (1987); *see also United States v. Wonson*, 28 F. Cas. 745, 750 (1812) (Story, Circuit Justice); Justice Clark, *The American Jury: A Justification*, 1 Valparaiso L. Rev. 1, 1-7 (1966); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 48-52, 58 (1977).

"structur[e] their governments" free from federal interference.[50]

In any event, *Mathews v. Eldridge* provides no support for Honda's argument.

1. The private interest at issue

The private interest at issue here is money damages. This Court has always indicated that society has a "minimal concern with the outcome" of proceedings with these stakes, *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), and in the context of actions for civil penalties between private parties this Court has steadfastly declined to add new procedural devices to the traditional requirements of notice, a meaningful opportunity to be heard, and a neutral decisionmaker. *See Haslip*, 499 U.S. at 23 n.11; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989); *United States v. Halper*, 490 U.S. 435, 450 (1989).[51]

2. The likelihood of "error"

We have already shown that Honda's definition of "error" is fatally flawed. There simply is no basis for Honda's claim that "error" occurs any time a judge would find that an award was contrary to the weight of the evidence. *See* pp. 40-41, *supra*. Moreover, Honda's statistical arguments lack any merit. The reality is that punitive damage awards are lower in Oregon than in most other States. *See* p. 19, *supra*. Honda's claim that grants of

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[50] *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 832 (1992); *see also New York v. United States*, 112 S. Ct. 2408, 2418, 2421, 2432-33 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991).

This Court has warned, in limiting the scope of *Mathews* in an analogous context, that "the expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between" federal and state power. *Medina v. California*, 112 S. Ct. 2572, 2576 (1992).

[51] Honda argues that the "quasi-criminal" nature of punitive damages, Pet. Br. at 21, warrants additional procedural safeguards, but that merely shows that *Mathews* is inappropriate for addressing the procedural requirements in punitive damages cases. This Court has held that *Mathews* "does not provide the appropriate framework for assessing the validity of state procedural rules" that are "part of the criminal process." *Medina v. California*, 112 S. Ct. 2572, 2576 (1992) (competency rules).

remittiturs in recent cases illustrate the need for judicial review, Pet. Br. at 27; WLF Br. at 5, is also founded on shoddy analysis of cases. As explained by one *amicus*, many of these cases are incorrectly described as ones in which awards were reduced for "excessiveness," when *in fact* they involve findings of legal error or of insufficiency of the evidence to support liability. *See* TLPJ Br. Even under Honda's reading of Oregon law, judicial review is available in all such cases. Indeed, the Oregon Supreme Court has the power to retry the damages issue *de novo* in proceedings where legal error has occurred below. *See* Part I-B-2, *supra*.

The primary reason cited by Honda for weight-of-the-evidence review in punitive damages cases is that juries are "bedazzled" by defendants' wealth, corporate status, or foreign ownership. We have already shown that Honda's complaint has no basis in the record of this case. *See* notes 2, 3, 5-10, *supra*. Honda's assertion that juries cannot be trusted to obey their instructions flatly contradicts its position below, where it pressed no claim that the jury had failed to follow its instructions. *See* p. 12, *supra*. In any event, the social science evidence does not bear out Honda's claim,[52] which is reminiscent of attempts to carve a "complexity

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[52] The leading student of the jury has written that "in the course of many years of study . . . I, personally, have become increasingly impressed with the humanity, strength, sanity and responsibility of the jury." Kalven, *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1075 (1964). The landmark study by Harry Kalven and Hans Zeisel, The American Jury (1966), established not only the factfinding competence of juries but also their basic fairness. In the sample of cases analyzed, judges agreed with juries 78 percent of the time. In civil cases the disagreements were balanced evenly between plaintiff and defendant verdicts. *See id.* at 58, 63. The authors noted that jurors' "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." *Id.* at 8.

This Court has already considered and rejected Honda's attack on the jury, *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968) (citing Kalven & Zeisel); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, now C.J., dissenting) (also citing Kalven & Zeisel). Honda has presented nothing to change this Court's prior conclusion. Indeed, Congress recently determined that "[j]ust as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct." H.R. Rep. No. 40, 102d Cong., 2d Sess., 1992 U.S. Code Cong. & Admin. News 602.

A recent symposium organized by the Brookings Institution and American Bar Association concluded that the jury is "a valuable process for decisionmaking and an effective means for the fair resolution of disputed fact." Brookings Inst., Charting a Future for the Civil Jury System 8 (1992). The largest empirical study of actual jury performance found that "[j]uries overwhelmingly take their duties seriously"; "[j]uries are evidence-oriented ... with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them"; "[j]uries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases"; and "jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy." J. Guinther, The Jury in America 102 (1988).

The evidence shows that the deliberative process allows jurors to pool their collective memories and intellect, so that they are able accurately to recall the evidence and apply the law. V. Hans & N. Vidmar, Judging the Jury 112, 117-18, 120-21, 129 (1986). "[T]he data lend no support to the widely held view that jurors are more generous than judges or arbitrators in awarding noneconomic damages." Vidmar & Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883, 896 (1993). If anything, juries seem to be "generally favorable toward business, skeptical more about the profit motives of plaintiffs than of business defendants, and committed to holding down awards." Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law & Soc'y Rev. 85, 93 (1992); *see also* Clermont & Eisenberg, *Trial By Judge or Jury: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1125-26 (1992) (in medical malpractice and products liability cases, plaintiffs received favorable verdicts more often from judges than from juries).

The materials cited by Honda do not support its argument:

- Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 745, (1959) (observing that "for every charge leveled against the jury in this debate there is likewise to be found a vigorous defense").
- Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 225, 245-46 (1989) ("[V]ery little is known about the ways that jurors determine punitive or exemplary damages . . . . [I]t is clear that jurors' reasoning is much more involved and sophisticated than [some believe]").
- Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Probs. 177, 202 (1989) ("Past research on jury decisionmaking gives us reason to be optimistic that lay juries are up to the task of comprehending and assessing liability in the vast majority of cases involving businesses and corporations. . . . [E]ven in cases involving some of the most negatively evaluated businesses around — the tobacco companies — juries show remarkable restraint in judging corporate culpability").
- Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151, 164 (1989) ("those who claim [that] deep pockets influence jury awards may be neglecting to take into account a coexisting and more critical determinant: higher expectations of corporate behavior").
- Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 176, 178 (1958) ("the filtering of individual eccentricity through the group process furnishes a major safeguard in the jury system. It is not merely that twelve heads may be better than one but that a verdict hammered out as a group product is likely to have important strengths"; "[w]hile jury awards are on the average higher than judge awards, there are a surprising proportion of cases in which the judge would have given more than the jury in fact did").
- Steele & Thornburgh, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 98 (1988) (concluding that "a typical jury makes a good faith effort to use its instructions for the purpose intended, that is, to reach a verdict according to the law"; criticizing lawyers for drafting complex and confusing instructions; and proposing reforms).

[53] See *In re Financial Securities Litig.*, 609 F.2d 411, 427-31 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1126-31 (Fed. Cir. 1985); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 355 (E.D. Mich. 1980); *Radial Lip Mach., Inc. v. International Carbide Corp.*, 76 F.R.D. 224, 227-29 (N.D. Ill. 1977).

[54] Oregon need not rely on the presumption of regularity in a vacuum, since it has created protective devices to diminish significantly the prospect of jury irresponsibility. *See* note 7, *supra*.

exception" into the Seventh Amendment.[53] Oregon is entitled to rely on the same principle that underlies our historic dedication to jury trial: "the conviction that each juror will faithfully perform his assigned duty." *Johnson v. Louisiana*, 406 U.S. 356, 379 (1972) (Powell, J., concurring); *Richardson v. Marsh*, 481 U.S. 200, 206 (1988) ("the almost invariable assumption of the law that jurors follow their instructions").[54] Indeed, this Court has recently affirmed the capacity of jurors properly to follow less-than-pellucid instructions even in the death penalty context, where the risk of jury passion and prejudice is surely at least as high as it is in a case like the one at bar. *Victor v. Nebraska*, Nos. 92-8894, 92-9049 (Mar. 22, 1994).

Honda also claims that the assessment of punitive damages is better suited to judge than jury. Pet. Br. at 23-26. But this argument is a radical departure from centuries of tradition, in which punitive damages have "always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day v. Woodworth*, 54

U.S. (13 How.) 363, 371 (1852); *see also* Br. of Legal Historians; *Tull v. United States*, 481 U.S. 412, 428 (1987) (Scalia, J., concurring in part and dissenting in part); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). In fact, "[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary." *Haslip*, 499 U.S. at 40 (Kennedy, J., concurring in judgment).

The reasons for this tradition are hardly obscure. Assessment of punitive damages usually requires fact-intensive inquiries into the *degree* of a defendant's intentionality and bad faith, which involve evaluations of witness credibility and demeanor; into whether a defendant's wrongdoing is part of a larger pattern or practice; and into the expected gain or potential harm of the defendant's conduct. While juries may make mistakes, so may judges, and there are quite plausible reasons for thinking that "juries are better qualified than judges to decide questions of fact." Tongue, *In Defense of Juries as Exclusive Judges of the Facts*, 35 Or. L. Rev. 143, 161-70 (1956). Moreover, the jury's "representative character permits its verdicts to express the sense of the community. . . . '[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.'" *Haslip*, 499 U.S. at 40-41 (Kennedy, J., concurring in judgment) (citation omitted); *see also Coffin v. Coffin*, 4 Mass. 1, 41 (1808). The judgment of history is that juries are better than judges at assessing the community's sense of outrage and deciding both the factual and qualitative questions necessary to impose punitive damages — or at least a state like Oregon might so conclude.[55]

[55] Honda's claim that reviewing judges should be authorized to override jury verdicts on the basis of "the range of punishments to which comparable wrongdoers have been subjected," and other information not available to the jury, Pet. Br. at 24, misses the point. This Court has indicated that proportionality review is not constitutionally required even in the death penalty context. *Pulley v. Harris*, 465 U.S. 37, 44-51 (1984). Moreover, the Court has expressed "skeptic[ism]" about the feasibility of such "intrajurisdictional and interjurisdictional comparisons" in punitive damage cases because "no two cases are truly identical." *TXO*, 113 S. Ct. at 2720 (plurality opinion). "[N]onuniformity cannot be equated with constitutional infirmity," *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring in judgment), because the jury, not the court, is charged with "mak[ing] a *qualitative* assessment based on a host of facts and circumstances unique to the particular case before it." *TXO*, 113 S. Ct. at 2720 (plurality opinion) (emphasis added). Moreover, Honda's argument that due process requires the jury's award to be reviewed according to information not available to the jury would in federal diversity cases raise serious questions under the Re-Examination Clause of the Seventh Amendment. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107-08 (4th Cir. 1991).

Finally, judicial review according to an "excessiveness" standard is hardly the panacea that Honda claims. In fact, until this case, the defense bar had disparaged judicial review as producing haphazard and irreconcilable results.[56] As Justice Kennedy has commented, "[a] reviewing court employing [the excessiveness] formulation comes close to relying upon nothing more than its own

[56] *See* Br. of Alabama Business Council in *TXO* at 17 (criticizing judges for relying on "their own subjective notions when reviewing punitive awards and warning that "*Haslip* merely transferred subjective discretion to the reviewing courts"); Br. of CBS, Inc., *et al.* in *TXO* at 23 ("Judges, like juries, can find neutrality difficult"); Br. of Amer. Automobile Mfgrs. Ass'n in *TXO*, at 9 (arguing for stricter jury instructions — such as those adopted by Oregon — rather than judicial review because "'[g]etting it right the second (or third or fourth) time around' is extremely costly and wasteful"). Even in this case, Honda's *amici* attack the usefulness of judicial review. *E.g.*, Br. of Product Liability Advisory Council at 26 ("Awards are affirmed based upon the judges' highly subjective notions of what constitutes good domestic, and sometimes even foreign, policy. . . . Review in the lower courts . . . remains largely subjective").

Blackstone warned that "in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in . . . by artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." 3 W. Blackstone, Commentaries 380 (1803); *see also* Wigmore, *To Ruin Jury Trial in Federal Courts*, 19 Ill. L. Rev. 97, 98 (1924) (juries less subject to bias and corruption). Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 253-58. Indeed, in *TXO* the Washington Legal Foundation argued that elected state judges (as judges in Oregon are) *pose* the very threat of discrimination against out-of-state corporations that Honda now claims they will *remedy*. *See* WLF Br. in *TXO* at 3.

subjective reaction to a particular punitive damages award . . . . This type of review, far from imposing meaningful, law-like constraints on jury excess, could become as fickle as the process it is designed to superintend." *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, even those who have in the past questioned the procedural fairness of jury discretion in punitive damages cases have readily conceded that after-the-fact judicial review is not the answer. *Haslip*, 499 U.S. at 43-44, 52-53, 55-56 (O'Connor, J., dissenting).

3. Oregon's interest

Honda ignores Oregon's substantial interests in Art. VII, § 3. By leaving punitive damage decisions to a jury of laypersons, the people of Oregon have decided that the most important qualification for making those determinations is connection with ordinary life in Oregon. *Cf. Gregory v. Ashcroft*, 111 S. Ct. 2395, 2405 (1991); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). Affirming the importance of the jury is in a very real sense an expression of "the choice, the right, of the people to be governed by their citizen peers." *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

Moreover, Art. VII, § 3 curbs unnecessary retrials by eliminating the wholly gratuitous power of judges to set aside verdicts based on their own views of the weight of the evidence and by establishing the state supreme court's power to adjust damages where legal error had occurred below. *See* Tongue, *supra*, 35 Or. L. Rev. at 143-44, 174-79.[57] Reducing the expense and long delay of litigation, and thus ensuring access to the courts for Oregon's citizens, is a substantial interest that should not be denigrated. *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148 (1907); *Armster v. United States District Court*, 792 F.2d 1423, 1429-30 (9th Cir. 1986); *Los Angeles County Bar*

[57] Any suggestion that Art. VII, § 3, was simply a pro-plaintiff measure adopted to increase the size of Oregon damage awards would be belied by the provision's enlargement of the state supreme court's powers, as well as the role of some of the most prominent members of the Oregon bar and business community in drafting and supporting it. *See* Lusk, *supra*, 35 Ore. L. Rev. at 2; Br. of Oregon Trial Lawyers Ass'n.

Association v. Eu, 979 F.2d 697, 706 (9th Cir. 1992). Honda's dismissal of Oregon's interest is in tension with the *holding* of *Mathews* — that a hearing even in the administrative agency context is not required where it would result in some uncertain "administrative burden and other societal costs." 424 U.S. at 347.

C. The Precedential Implications of Honda's Argument Are Breathtaking

There is no limiting principle to Honda's argument. The "excessiveness" review it seeks is merely a species of weight-of-the-evidence review. Assessment of punitive damages, far from being a context where jury factfinding is closely constricted, has always been a subject peculiarly *within* the jury's domain. *See* pp. 38-39, 45-46, *supra*. And, unlike the binary question of liability, there is usually no single "correct" answer respecting the proper sum of damages in a personal injury or punitive damages case. Because there is an entire range of permissible awards, the jury should receive *greater* latitude, not *less*, when it comes to punitive damages.

Hence, Honda's argument that due process requires weight-of-the-evidence review would constitutionalize Fed. R. Civ. P. 59(a), Fed. R. Crim. P. 33 and similar state rules; would overturn prior decisions of this Court holding that there is no constitutional right to such weight-of-the-evidence review, *see* pp. 40-41, *supra*; would upset settled principles of federal administrative law that permit agency decisions adjudicating even "private rights" to be upheld on the basis of "substantial evidence" judicial review, *see St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1935); *id.* at 84 (Brandeis, J., concurring); *Crowell v. Benson*, 285 U.S. 22, 63-65 (1932); and would invalidate virtually all verdicts by Oregon juries now on direct review, since Art. VII, § 3 applies to *all* facts found by Oregon juries, whether in civil, criminal, or even death penalty cases. *See State v. Montez*, 789 P.2d 1352, 1381 (Or. 1990); *State v. Wagner*, 752 P.2d 1136, 1171 (Or. 1988). Similarly, this Court would have to vacate all criminal convictions now on direct review from the States that do not have a weight-of-the-evidence standard

for judicial review of jury verdicts in criminal cases.[58] If weight-of-the-evidence review were to be constitutionally mandated in civil cases, *a fortiori* it would be required in criminal proceedings.

To avoid this plethora of practical absurdities this Court need only leave undisturbed the judgment below.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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[58] As this Court noted in *Hudson v. Louisiana*, *supra*, 450 U.S. at 44 n.5, the States currently differ on the policy issue of "[w]hether a state trial judge may assess evidence as a '13th juror.'" At least eight States other than Oregon appear to deny weight-of-the-evidence review in criminal cases. *See Ex Parte Nice*, 407 So.2d 874, 881-82 (Ala. 1981); *People v. Gennings*, 583 P.2d 908, 909 (Colo. 1978); *State v. Colombo*, 238 A.2d 806, 808 (Conn. 1967); *State v. Hall*, 662 P.2d 1306, 1309 (Mont. 1983); *State v. Brown*, 573 A.2d 886, 890 (N.J. 1990); *State v. Chavez*, 679 P.2d 804, 806 (N.M. 1984); *State v. Williams*, 634 P.2d 868, 872 (Wash. 1981); *Smith v. State*, 564 P.2d 1194, 1198 (Wyo. 1977). In light of *Hudson*, States which *do* permit weight-of-the-evidence review do so as a voluntary choice. *See In re Petition for Writ of Prohibition*, 539 A.2d 664, 680 & n.18 (Md. App. 1988).